No. 22,462

IN THE

United States Court of Appeals

For the Ninth Circuit

TRUCKING, UNLIMITED, et al.,
Appellants,

vs.

CALIFORNIA MOTOR TRANSPORT CO., et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

BRIEF FOR APPELLEES

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FILED

PERNAU WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTIONAL STATEMENT

The jurisdiction of the Court is as stated in the brief of Appellants.

STATEMENT OF THE CASE

A. The Parties

Appellees (hereinafter referred to as "defendants") are trucking companies operating under authority granted by the California Public Utilities Commission (hereinafter referred to as "PUC") and the Interstate

Commerce Commission (hereinafter referred to as "ICC"). All of them are separate, independent entities, except that Oregon-Nevada-California Fast Freight, Inc. is under ICC-approved common control with Southern California Freight Lines, Ltd., and Ringsby Truck Lines provides certain services for Ringsby-Pacific, Ltd. With those exceptions, all of the defendants compete with one another to the extent of their operating rights for the business of transporting general commodities between various points in the State of California. Some of such traffic although transported by defendants between points wholly within California is interstate or foreign in character (as part of an interstate or foreign movement) and the balance is intrastate in character. Certain of defendants also have interstate rights authorizing them to operate in other states.

The seventeeen defendants compete not only with each other but with the fifteen plaintiffs and with numerous other carriers to the extent of their respective operating rights granted by the PUC or the ICC.

B. The Determination by the Federal District Court Below

The First Amended Complaint was dismissed by the lower court on the ground that it does not state a claim upon which relief can be granted. The court stated that since the pleading had already been amended once, "presumably plaintiffs have gone as far as they can truthfully go toward alleging an antitrust violation." Memorandum of Decision, R. 64. Even so, the court granted plaintiffs an additional 15 days to amend. The plaintiffs did not accept that opportunity, but instead took this

appeal, so it must be concluded that the court below was right in its conjecture.

We emphasize this fact because the brief of plaintiffs does not stick to the allegations of the First Amended Complaint. By asserting additional allegations, pages 3-16, it sets up a hypothetical complaint which becomes the subject of its brief. This makes it difficult to focus on the complaint itself and the factual allegations which require consideration.

In concluding that the First Amended Complaint does not state a cause of action, the lower court was fully cognizant that it must resolve all doubts in favor of sustaining the complaint (Memorandum of Decision, R. 47):

> "We recognize of course that a complaint should not be dismissed under Rule 12(b) (6) Fed.R.Civ.P., for insufficiency unless it appears to be a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim."

C. The Allegations of the First Amended Complaint

The allegations in the complaint are succinctly and accurately set forth in the careful summary thereof made by the court below which reads as follows (R. 45-46):

> "The First Amended Complaint alleges in substance and effect (See: First Amended Complaint, par. 8, A-I, pp. 6-13) that ever since February, 1961, defendants have conspired to put plaintiffs and their other competitors out of business and for that purpose have combined their financial and other resources to carry out a consistent, systematic and

uninterrupted program of instituting through the procedural machinery of the California PUC, the ICC and of the courts, opposition to every request or application (mainly applications for certification under the public convenience and necessity provisions of the California Public Utilities Act, §§ 1061-1073) made by plaintiffs or by other competitors of defendants before such agency, and to appeal any rulings of those agencies to the courts, all 'without probable cause' and 'regardless of the merits of the cases of plaintiffs and defendants' other competitors or of the merits of defendants' opposition.'

"It is further alleged that defendants have contributed to a special trust fund for this purpose according to their respective yearly gross incomes and regardless of whether a contributor has a competitive interest in any particular request or application made by plaintiffs or other competitors; that without such an agreement to jointly finance such oppositions, such oppositions would not be made at all because of the great expense involved in such a program of protests; that, upon prevailing against plaintiffs and other competitors, defendants engage in a joint program of also resisting rehearings, reviews or appeals sought by plaintiffs or other competitors; that defendants have made known to plaintiffs and other competitors their intended program of combined and well-financed opposition in order to induce plaintiffs and their other competitors to abandon existing applications or requests and to refrain from making further applications or requests; that defendants have thus depleted the resources of plaintiffs and other competitors expended in resisting or overcoming the defendants' conspiracy of opposition; that defendants have thereby deprived the agencies and courts of the benefit of facts and in-

formation, and that defendants have defeated applications and requests of plaintiffs and other competitors on the basis of decisions which, but for defendants' combination, would not have been rendered adversely to plaintiffs and other competitors because, absent such conspiracy of opposition, no opposition would have been made."

D. What the Complaint Does Not Allege

The complaint does not allege any of the following:

1. That there was any activity in implementation of the conspiracy other than defendants' protests, petitions and appeals before the agencies and courts, and the making known of such activity.

2. That there was any agreement between defendants that they would refrain from opposing one another's applications or that in fact the defendants themselves failed to oppose one another's applications.

3. That plaintiffs or any of them were prevented by defendants from applying to the PUC or the ICC for operating authority or from presenting their proof in full before such agency or from exercising their rights of appeal or review before the courts in the event the agency refused to grant their applications.

4. That either the PUC or the ICC or any reviewing court was prevented by defendants from exercising full control over its own procedures, including the rejection of protests, complaints or appeals by defendants in the event they were found by such agency or court to constitute mere sham or an abuse of the administrative or judicial process.

5. That either the PUC or the ICC was prevented by defendants from reviewing all evidence before it and of exercising an independent judgment on the merits or that the reviewing court was prevented by defendants from exercising an independent judgment on the merits of the appeal.

6. That defendants offered false evidence or failed to present pertinent evidence or arguments to the PUC, the ICC or the courts. Indeed, the brief of plaintiffs admits that defendants in appearing before any of these tribunals made "the best case the facts would permit". Brief p. 8.

7. That it was unlawful for defendants to advocate to the PUC that it return to the strict statutory standard of public convenience and necessity in granting certificates which the PUC had abandoned for several years prior to 1961.

8. That the applications filed by plaintiffs and others were all meritorious.

9. That the protests filed by defendants were all unmeritorious.

Plaintiffs presumably knew that they could not truthfully make any of the above allegations.

QUESTION PRESENTED

Does an agreement by a group of motor carriers to protest the granting to competitors of certificates of public convenience and necessity, and the implementation of that agreement by protesting all applications by such

competitors before the California Public Utilities Commission and the Interstate Commerce Commission, making the best case the facts permit, however, and seeking to persuade the commission to apply the statutory requirements of convenience and necessity strictly, and appealing to the courts in the event of an adverse administrative ruling, and making such program of protest known, constitute a violation of the Sherman and Clayton Acts if the motive is to reduce or destroy competition, it being understood that the cost of the effort is jointly shared?

SUMMARY OF ARGUMENT

The court below correctly found that the above question should be answered in the negative and that the First Amended Complaint failed to state a claim upon which relief could be granted. The court relied on the law as enunciated by the U.S. Supreme Court in *Eastern Railroad Presidents Conference v. Noerr,* 365 U.S. 127 (1961), and *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), as well as later cases following those decisions.

As the district court expressly pointed out in its Memorandum of Decision, the complaint does not charge acts in restraint of trade or attempts at monopoly except in the one respect that defendants associated for the purpose of intervening in regulatory proceedings to oppose plaintiffs' applications (Memorandum of Decision, R. 47):

> "There is no allegation that defendants have engaged in, or conspired to engage in, any other conduct designed to restrict the competition of plaintiffs or to monopolize the industry, e.g., rate control, restriction of service, boycott or blacklisting of plaintiffs or plaintiffs' customers or any similar conduct which might violate the antitrust laws.
>
> "Thus, plaintiffs' First Amended Complaint has been narrowly drawn to present the single question of whether defendants' association for intervention in regulatory proceedings before the PUC or the ICC—without any other alleged anti-competitive conduct—is rendered violative of the antitrust laws by reason of defendants' alleged anti-competitive purpose and intent."

The *Noerr* and *Pennington* cases "establish the rule that violation of the Sherman Act cannot be predicated upon combined attempts to influence public officials in the enforcement of laws even when the sole purpose and intent of the persons engaging in such activity is, and the result may be, to destroy their competitors. . . . The Supreme Court has resolved the problem of bad purpose or intent *vis-a-vis* freedom of resort to public officials and agencies, by holding that the latter is to be subserved notwithstanding the risk of tolerating an anti-competitive purpose of such resort and a possible anti-competitive result." (Memorandum of Decision, R. 51; 57-58).

The rationale of the *Noerr-Pennington* doctrine extends not only to activities directed to legislatures and executive officers of the Government but to activities directed to the courts or regulatory agencies for the

purpose of taking positions on points of fact or law pertinent to the regulatory acts. It is immaterial whether the functions of the regulatory agencies and the courts be described as executive or legislative or judicial in nature, because *whatever* they are, there is a right, *political* in nature, of access to such agencies and courts. The U. S. Supreme Court has held that the First Amendment gives the right, political in nature, of access to the judicial as well as executive or legislative branches of government, whenever such access constitutes a form of political expression. *NAACP v. Button,* 371 U.S. 415 at 430 (1963). A concomitant of the political right is the governmental need that there be a free flow of information within the bounds of established procedure.

None of the decisions since *Noerr* and *Pennington* interpret those cases to hold that the antitrust exemption applies only to attempts to influence legislatures and executive officers of government. Moreover, several cases have expressly applied the exemption to attempts, through the formal quasi-judicial processes of administrative tribunals and the judicial processes of courts, to influence those respective bodies.

The Supreme Court in *Noerr* could envision only one situation in which the doctrine therein stated might not apply, viz., when the act of petitioning to government is mere sham. 365 U.S. at 144. No such exception is effectively alleged in the First Amended Complaint although plaintiffs, being aware of the "sham" exception, no doubt went as far as they dared in attempting to set forth allegations that would fit within it. The complaint speaks in terms of delaying, discouraging, de-

tering, clogging, impeding, harassing, obstructing, making unavailable and abusing the judicial machinery. The substance of the factual allegations accompanying these abrasive adjectives, however, is simply that defendants put up a hard fight. Any protest in a court or administrative proceeding can cause delay and be said to discourage, deter or harass the other side. Any protest in a court or administrative proceeding can loosely be said to obstruct, make unavailable, clog or impede the judicial machinery. Any program of protest when known or publicized is apt to deter people from applying to the governmental body, and can irresponsibly be characterized as an abuse of the judicial machinery and a depriving of an agency of facts it might otherwise have. Any protest is apt to entail expense to applicant (as well as protestant), but that is inherent in the common law system.

If plaintiffs had been able to allege that the ICC, the PUC and the courts had become a tool in plaintiffs' hands, that all of the applications which defendants protested were meritorious, that all of the protests by defendants were unmeritorious, that plaintiffs had presented false evidence, had prevented the ICC and the PUC and the courts from controlling their own processes and from making decisions on the merits, so that the whole program of protesting might fall within the definition of "mere sham" as that term is used by the Supreme Court in *Noerr,* the plaintiffs might have had the framework of a possible valid complaint. Plaintiffs could not, however, truthfully make such allegations. Accordingly the doctrine of *Noerr-Pennington* applies.

The several patent cases relied on by plaintiffs in an effort to nullify the impact of the *Noerr-Pennington* doctrine as applied to the First Amended Complaint are simply not relevant. A patent right is a right to exclude, it is a private right akin to ownership in land or personalty or in a business. There is no element of continuing governmental policy-making or policy-enforcing with respect to it. Therefore anti-competitive acts in the use of a patent come under the strictures of the antitrust laws. A certificate right, on the other hand, is simply a right to operate. The administrative agency is given a continuing jurisdiction to determine how many, if any, identical rights or overlapping rights will be given to others. The agency acts under the broadest boundaries of the public convenience and necessity concept. Every time it acts it is acting in the realm of political activity as that term is used in *Noerr*. *Noerr* holds that in such situation the antitrust law does not apply.

The incidental economic harm coming to plaintiffs in being faced with protests in antitrust proceedings is not a basis for recovery according to *Noerr*. Also since decisions of the PUC or ICC or in courts adverse to plaintiffs are not a basis for recovery, *Parker v. Brown,* 317 U.S. 341 (1943), there is no allegation in the First Amended Complaint upon which plaintiffs can recover. Under *Pennington* there is therefore no cause of action in antitrust.

To conclude, the court below correctly decided that the complaint does not state a claim in antitrust upon which relief can be granted.

We turn now to the more detailed Argument.

ARGUMENT

I. THE ALLEGATIONS IN THE FIRST AMENDED COMPLAINT DO NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. The Complaint Alleges Joint Use of Regular Administrative and Court Review Procedures Accompanied by an Anti-Competitive Motive

The gist of the First Amended Complaint is that defendants adopted and made known a plan under which they protested all applications before the PUC or ICC for new operating authorities, or for purchase of existing operating authorities from other carriers, or for registration of intrastate operating rights with the ICC, and if the applications were granted, filed petitions for rehearing or sought review in the courts. The complaint alleges that the protests and petitions by defendants were made for the purpose of reducing or eliminating competition.

There is no suggestion that anything other than regular administrative or court review procedures were followed, or that any improper technique, such as misrepresentation, was ever employed by defendants. On the contrary plaintiffs in their brief before this court admit that defendants would always "make the best case the facts permit". Brief p. 8.

There is no allegation that defendants engaged in any other anti-competitive activity. There is no allegation, nor could there truthfully have been, that defendants agreed not to protest each other's applications. There is no allegation that plaintiffs or any of them were prevented by defendants from making applications or from presenting full proof or exercising their rights of appeal. There

is no allegation that the defendants prevented the PUC, the ICC or the courts from exercising full control over their procedures, or that such bodies were prevented by defendants from making decisions on the merits. There is no allegation that all applications by plaintiffs were meritorious or that all of defendants' protests were unmeritorious.

Thus the First Amended Complaint is narrowly drawn to present the single question whether defendants' adoption and making known of a plan to intervene in all regulatory proceedings before the PUC, the ICC and the courts—without any other alleged anti-competitive conduct—is rendered violative of the antitrust laws by reason of defendants' alleged anti-competitive purpose and intent.

B. The Noerr-Pennington Doctrine

The *Noerr* and *Pennington* cases, decided by the U.S. Supreme Court in 1961 and 1965 respectively, establish the rule that violation of the Sherman Act cannot be predicated upon combined attempts to influence the passage of laws or attempts to influence public officials in the enforcement of laws even when the sole purpose and intent of the persons engaging in such activity is, and the result may be, to destroy their competitors.

1. The Noerr Case

This case decided by the U.S. Supreme Court in 1961 was an action by a group of trucking companies under Section 4 of the Clayton Act for treble damages and injunctive relief against a group of railroads, alleging

that the railroads had engaged a public relations firm to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, that the sole motivation was injury to and ultimate destruction of the truckers as competitors, that deception was used in the campaign, and that the purpose of the railroads was more than merely an attempt to obtain legislation, it was to hurt the truckers in every way possible even though no legislation was secured, and to destroy their good will.

The trial court gave judgment against the railroads. The court declared it was not holding illegal mere efforts to influence the passage of new legislation or the enforcement of existing law. Rather it found that the railroads had violated the antitrust laws, first because the railroads' publicity campaign, insofar as it was actually directed at law making and law enforcement, was malicious in that its only purpose was to destroy the truckers as competitors, and was fraudulent in that it involved deceiving the law making and law enforcement authorities by use of the so-called third party technique; and, secondly, because an important, if not overriding purpose of the railroads was to destroy the truckers' good will, a purpose that went beyond merely attempting to obtain legislation.

The Third Circuit affirmed the trial court, but on writ of certiorari the Supreme Court reversed the judgment, holding that there was no antitrust violation upon the facts as found by the trial court. The Court started with the premise "that no violation of the Act can be

predicated upon mere attempts to influence the passage or enforcement of laws". It then went on to the next premise that "where a restraint . . . is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." The Court then stated that (365 U.S. at 136):

> "We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."

The reasons for the Court's so concluding were (1) that such associating "bears very little if any resemblance to the combinations normally held violative of the Sherman Act", (2) that a contrary interpretation of the Act "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade" by keeping people from freely informing the government of their wishes and (3) that a contrary interpretation would raise the important constitutional question of impairment of the First Amendment right to petition.

The Supreme Court further held that this conclusion is not changed (a) by the *intent* of the conspirators whatever such intent may be, including a sole intent to destroy competitors as part of the attempt to influence the passage and enforcement of laws, (b) by *deceptive* and unethical techniques in the attempt to influence the legislature and the executive, or (c) by a *purpose going beyond* merely attempting to have restrictive legislation

enacted, viz., a purpose to hurt the competitors in every way possible, even though no restrictive legislation was secured.

2. The Pennington Case

This case decided by the Supreme Court four years after *Noerr* followed *Noerr* by concluding that (a) joint efforts by a union and large coal operators to influence the Secretary of Labor to obtain establishment under the Walsh-Healy Act of a minimum wage scale for employees of all contractors selling coal to the TVA and (b) joint efforts by the same conspirators to urge the TVA to modify its policies in buying coal, did not violate the antitrust laws even though the purpose was to make it difficult if not impossible for the small contractors to compete in the TVA contract market. In relying upon *Noerr,* the court said 381 U.S. at 670:

> "Noerr shields from the Sherman Act a concerted effort to influence *public officials* regardless of intent or purpose. . . . joint efforts to influence *public officials* do not violate the antitrust laws even though intended to eliminate competition." (Emphasis added.)

It will be noted that the TVA, like the ICC, is an administrative agency of the federal government. The ICC is not a court but an executive administrative agency of the federal government. See *Democracy in Action* by Milford Springer, Esq., Vantage Press, 1966, page 70 et seq.

In the *Noerr* and *Pennington* cases the Supreme Court has in effect weighed the right to petition government

and the desirability of a free flow of information to the government, in balance with the factor of the antitrust intent or antitrust result respecting certain kinds of concerted activity, and has concluded that the latter factor must be risked in order to subserve governmental needs and political rights.

C. The Noerr-Pennington Doctrine Applies to Attempts to Influence Administrative Bodies and Courts Through the Medium of Their Established Procedures

In *Noerr* the conspiracy was directed at attempting to influence legislation, amongst other things by creating an atmosphere of distrust so that the Governor would veto a bill. In *Pennington* the conspiracy was directed at influencing the Secretary of Labor and TVA officials in making executive or administrative decisions. Nevertheless, the rationale of the *Noerr-Pennington* doctrine is clearly and equally applicable to attempt to influence regulatory agencies and courts, through the medium of their respective established procedures, for the purpose of taking positions on points of fact or law pertinent to the regulatory acts. The court below so found, and other courts have found to similar effect. There are no cases holding to the contrary.

In the sections which follow the cases will be reviewed first, and then the rationale will be discussed.

1. Cases Before and Since Noerr

(a) *Citizens Wholesale Supply Co. v. Snyder,* 201 Fed. 907 (3d Cir. 1913): combination by merchants' association to persuade district attorney to prosecute a competitor for violation of a local peddling ordinance.

The competitor was convicted but on appeal the ordinance was struck down as unconstitutional. The competitor then sued the merchants' association under the antitrust laws. The Third Circuit held there was no violation, saying, 201 Fed. at 910:

> "In good faith and on plausible grounds they believed the law to be with them, and they had a right to try out such a controversy in the courts, although the litigation might be expensive for their antagonist as well as themselves".

(b) *Washington Brewers v. United States,* 137 F.2d 964 (9th Cir., 1943): combination by brewing companies to influence such bodies as the California State Board of Equalization to adopt policies which would tend to restrict competitors, and combination by the same group to aid various state liquor control boards, including the California State Board of Equalization, in the policing of legislation under their respective jurisdictions. The Ninth Circuit found these alleged activities not to state an antitrust offense. The court said (137 F.2d at 968):

> "We know of no reason why brewers, like other people, may not jointly advocate state legislation thought by them to be desirable, nor why they may not singly or in concert, aid the authorities *in the policing of any legislation which it is within the competency of states to adopt.*" (Emphasis added.)

(c) *Harman v. Valley National Bank,* 339 F.2d 564 (9th Cir., 1964): combination to inform the Attorney General of Arizona (alleged to have been a participant in the combination) of alleged irregularities and to per-

suade him to file a suit against a savings and loan association for irregularities under the state statute. The suit resulted in placing the savings and loan association in receivership and closing its business. This hurt the plaintiff because it was unable to get the receiver to approve a contractual claim against the savings and loan association. The plaintiff brought an antitrust action. The Ninth Circuit agreed that *Noerr* would apply whether or not the proceeding brought by the Attorney General had substantive merit, and that the defendants' conduct described above "would be essentially political in nature" and immune from attack for the reasons set forth in *Noerr*.

(d) *Association of Western Railroads v. Riss,* 299 F.2d 133 (C.A.D.C. 1965); case below is reported at 170 F.Supp.354 (D.C.D.C. 1959): combination of 58 railroads, several railroad trade associations, and a public relations firm, to carry on a program of soliciting, directly and indirectly, various state officials to take steps leading to the revocation and cancellation of interstate motor carrier operating rights held by plaintiff. A public relations expert was hired to persuade the Public Utilities Commission of Ohio to file proceedings before the ICC looking toward cancellation of plaintiff's operating authority. There also was solicitation of state and city officials to enact laws, ordinances and regulations designed to hamper and to render economically unfeasible the operations of plaintiff. Also state officials were urged to carry out a campaign of unusually strict enforcement of statutes, ordinances and regulations aimed at plaintiff's vehicles, even to the point of urging the Public

Utilities Commission of Ohio to assign special investigators to follow the plaintiff's trucks.

The combination was also alleged to have abused its privilege of intervention in proceedings before the ICC by carrying on an extensive campaign of anti-truck propaganda in order to persuade citizens' groups and others to register their complaints against plaintiff in the course of proceedings started by plaintiff before the ICC to obtain new operating authorities.

Relying on *Noerr* the Court of Appeals for the District of Columbia held all these acts beyond the reach of the Sherman Act.

(e) *Woods Exploration Co. v. Aluminum Co.*, 36 F.R.D. 107 (S.D.Tex. 1963); *Woods Exploration Co. v. Aluminium Co.*, 284 F.Supp. 582 (S.D.Tex. 1968): allegation that conspirators filed false forecasts ("false nominations") with the Texas Railroad Commission of the amount of gas that could be produced and sold from certain oil fields, as a result of which the Texas Commission issued allowance orders on plaintiff's wells that caused it economic injury; also allegation upon amended complaint that defendants made efforts to bring about a change in Commission rules and regulations; also allegation upon amended complaint that defendants instituted or defended litigation involving the validity of certain Commission rules and regulations.

Under the Texas statute the Texas Railroad Commission is given jurisdiction to limit total production from a field to the reasonable market demand for gas made upon the field. In making its allowance orders the Texas

Commission considers the monthly "nominations" filed but is not limited to them and in fact uses various periods and various criteria to determine the "reasonable market demand".

On the first round before the Federal District Court a motion to dismiss was denied on the ground, amongst others, that defendants had no constitutional right to present false nominations, and that therefore their activity did not fall within the concept of "political activity" protected from the antitrust laws. The case was appealed on procedural grounds and returned to another federal district judge (Singleton) pursuant to a docket equalization measure.

Judge Singleton reviewed the applicable cases in detail, including *Noerr* and the cases following it, and concluded that the *Noerr* doctrine should be applied. In the course of his reasoning he pointed out that since no statutory provision prescribes the procedure by which market demand is to be determined the matter falls "under the rule-making power of the Commission". This is clearly analogous to our case in which there is no statutory provision prescribing the procedure by which public convenience and necessity is to be determined.

Respecting the allegation of false nominations Judge Singleton said, 284 F.Supp. at 590:

> "Plaintiffs seek to distinguish Noerr on the ground that it exempts only 'political activity' from the scope of the Sherman Act and thus is not controlling for, they contend, the filing of false nominations is properly 'business activity' and not 'political activity' protected by Noerr. This proffered distinction,

> I think, places more emphasis than is warranted on the phrase 'political activity' as used by the court in Noerr. Plaintiffs contend that protected 'political activity' encompasses only lobbying activities or influence peddling and does not apply to a situation such as this where the defendants and all other producers are required by commission regulations to submit nominations under oath. There is some doubt whether this line of reasoning is accurate. . . . However, it is unnecessary to resolve the issue on a determination that the filing of false nominations is or is not political activity. The mere manipulation of labels does not determine the outcome of this case, for as made clear by other cases, liability is precluded if the restraint complained of results from otherwise valid governmental action even though brought about by the improper conduct of a private party."

The "other cases" referred to in the last sentence of the quotation were *Pennington,* and *Okefenokee Rural Electric Membership Corporation v. Florida Power and Light Co.,* 214 F.2d 413 (5th Cir. 1954). In our case of course there is nothing comparable to false nominations. The complaint does not allege any false presentation under oath, nor could it have truthfully done so. As plaintiffs' brief concedes, defendants made in each instance the best case they could.

With respect to the allegations that the defendants made efforts before the Texas Railroad Commission to bring about a change in that Commission's rules and regulations, Judge Singleton ruled as follows (284 F. Supp. at 594):

> "As to any efforts taken by defendants before the commission to influence the commission to alter old rules or promulgate new ones, it is clear that Noerr, Pennington and Okefenokee preclude liability."

In the instant case defendants are charged with attempting to alter the PUC's rules for determining public convenience and necessity. The *Woods* case represents a clear holding that such activity is protected by *Noerr*.

With respect to the allegation that defendants had engaged in litigation in an attempt to stop the drainage of gas from beneath their tracts because of rules prescribed by the commission, Judge Singleton once more relied upon *Noerr* in concluding that there was no cause of action under the antitrust laws. He said, 284 F.Supp. at 595:

> "At least one court has held that Noerr applies to such joint efforts taken in the courts by holding that 'seeking lawful . . . judicial action does not violate the antitrust laws, even if interestate commerce is involved and even if the purpose and effect is to curtail competition'. Brackens Shopping Center Inc. v. Ruwe, 273 F.Supp. 606 (S.D.Ill. 1967). But even if Noerr does not extend this far, the litigation of which plaintiffs complain cannot afford a recoverable element of damages, for it is clear that the suits were initiated with probable cause."

(f) *Baltimore & Ohio Railroad Co. v. New York, New Haven & Hartford Railway,* 196 F.Supp. 724 (S.D. N.Y. 1961): the action challenged under the antitrust laws consisted of (a) propagandizing the Interstate Commerce Commission for the proposition that an increase in the

per diem car rate would increase car supply and eliminate car shortages, (b) propagandizing the Senate Committee on Interstate and Foreign Commerce to like effect, (c) utilizing the process of the Interstate Commerce Commission to make increased per diem charges binding upon the complainants, and (d) utilizing the process of the federal court to force payment of certain per diem charges. The court, in reliance upon *Noerr,* dismissed these contentions with the following language (page 748):

> "Finally, neither the filing of suit nor the propagandizing of the commission in furtherance of plaintiffs' joint effort to impose these rates is in violation of the Sherman Act."

(g) *Bracken's Shopping Center v. Ruwe,* 273 F. Supp. 606 (S.D.Ill. 1967): defendants conspired to file in the state court a representative suit challenging the validity of a statute under which the city had vacated certain streets. In granting a motion to dismiss the court said (page 607):

> "Since the complaint alleges no other act or conspiracy, the court grants the defendants' motions to dismiss because it does not believe that *resort to the judiciary,* even in concert or in an effort to restrict competition, can violate the antitrust laws of the United States". (Emphasis added.)

The court went on to refer to *Noerr* and *Pennington* and stated that those cases stand for the general proposition that "seeking lawful legislative, executive, or judicial action does not violate the antitrust laws, even if interstate commerce is involved and even if the purpose and effect is to curtail competition."

(h) *Schenley Industries, Inc. v. New Jersey Wine and Spirit Wholesalers Association,* 272 F.Supp. 872 (D.N.J. 1967): the allegation was that a wholesale liquor dealers' association attempted to use improper influence upon the State Division of Alcoholic Beverage Control in order to obtain favorable decisions. The court in concluding that the portions of the complaint which alleged such activities should be stricken said (page 884):

> "In addition, however, Schenley continues to suggest that the lobbying itself, if sufficiently illegal apart from its antitrust aspect, is not shielded from liability under the Sherman Act. Schenley argues that Noerr and Pennington protect lobbying merely misleading or unethical, but do not extend to acts flagrantly violative of state law.
>
> * * *
>
> "Noerr and Pennington make clear that concerted private effort to influence government action does not violate the Sherman Act, no matter how self-interested, devious, or anti-competitive".

(i) *ABT Sightseeing Tours v. Gray Line,* 242 F. Supp. 365 (S.D.N.Y. 1965): combination to persuade legislative bodies and administrative agencies of the City of New York to enact and promulgate laws and regulations which would suppress and eliminate competition between defendants and plaintiffs. A motion to strike this part of the complaint was granted, citing *Noerr.*

(j) *U.S. v. Johns-Manville Corporation,* 259 F. Supp. 440 (E.D.Penn. 1966): informal approach to municipal authorities to persuade them to impose restrictive specifications on pipe which the municipal authorities would

accept. Such activity was held not subject to the antitrust laws, relying upon *Noerr* and *Pennington.*

The foregoing summary reveals that attempts to influence administrative agencies or courts were involved in seven of the twelve cases applying the *Noerr* doctrine. Moreover, while the attempts to influence were by lobbying in a majority of the cases, several involved attempts to influence through the formal processes of an administrative agency or court.

2. The Rationale of Noerr-Pennington Applies to the Acts Alleged

The rationale of *Noerr-Pennington* is that governmental bodies can act effectively only if they have access to information furnished to them through normal procedures. In the case of legislatures normal procedures consist of lobbying activity. In the case of administrative tribunals and courts normal procedures consist of intervention, pleading, presentation of evidence under oath, cross-examining, and briefing. The need by government, whenever it is engaged in policy-making or law-making functions, to receive information, and the constitutional right to petition governments must not be jeopardized by fear of antitrust violations. Therefore the antitrust laws must be construed to exempt such activity.

a. Certificate Proceedings Are Policy-Making Functions Delegated by the Legislature

The California PUC and the ICC perform a delegated legislative function in granting certificates of public convenience and necessity. Thus we find in the book *Public Utilities Regulatory Law,* Vantage Press, 1956, by the late Judge Everett McKeage, former chief counsel and sub-

sequently president of the California PUC, the following language:

> ". . . the licensing of public utilities [i.e., the issuing of certificates of public convenience and necessity, the transferring thereof, and the revocation thereof] are legislative in nature and the [California] Commission has been constituted the lawful agency of the state to exercise such legislative authority". Page 107.

The certificate jurisdiction of the Interstate Commerce Commission is of the same character, and each of the commissions is guided by the same legislative standard, "public convenience and necessity".

Judge Friendly of the Court of Appeals for the Second Circuit has observed that the work of administrative agencies is work delegated by the legislature. See Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards,* 75 Harv.L.Rev. 863, 871 (1962). Professor Davis in his *Administrative Law Treatise* (1958) recognizes the legislative aspect of administrative action in Section 7.20:

> "Legislative facts are often best developed through written presentations, or through an argument type of hearing, as distinguished from a trial. The proper method for meeting adverse legislative facts is often written or oral argument; occasionally convenience calls for rebutttal evidence or cross-examination, but when the facts are legislative, that is a matter of convenience and not of procedural right".

b. Participation by Competitors in Certificate Proceedings Is a Normal and Well-Recognized Procedure

The rules of procedure which the PUC and the ICC have established pursuant to the California Public Utili-

ties Code and the Interstate Commerce Act, respectively, in certification proceedings fully recognize the need by the agency to receive a free flow of information from protestants as well as applicants.

First as to the PUC its rules require an applicant for a certificate to notify potential competitors (Rule 21). Such competitors may intervene and participate as parties, offering evidence and engaging in cross-examination (Rules 53-57), and may file briefs (Rule 75), and present oral argument (Rule 76). The Public Utilities Code Sections 1731-1736 permit any party to seek rehearing before the PUC, and to seek court review. The PUC's rules give the hearing officer ample power to restrict presentation and cross-examination by intervening parties and to prohibit intervention unless the petitioner can demonstrate a legitimate interest (Rule 63).

Next as to the ICC, the Interstate Commerce Act and the Interstate Commerce Commission's Rules of Procedure similarly provide for notice of certificate proceedings through publication in the Federal Register, and the right of potential competitors to protest and participate in hearings. 49 C.F.R. Sections 1100.39, 1100.40, 1100.74. The rules specifically contemplate that protests may be withdrawn after amendment of an application (49 C.F.R. Section 1100.247(d)(5)):

> "Where a person has a limited interest in an application, which possibly could be eliminated by a restrictive amendment to the application, which amendment must be acceptable to the Commission, it may also include in a protest filed in conformity with this paragraph an offer to withdraw the protest in

the event of acceptance by applicant and the Commission of such amendment".

The ICC hearing officer has ample power to restrict the issues and to limit or exclude evidence offered by protesting carriers (49 C.F.R. Section 1100.76). Protesting carriers, as other parties, may file exceptions (Section 1100.96), seek rehearing or consideration (Section 1100.101), and seek judicial review before a three-judge federal court, 28 U.S.C. §§ 1336, 1398.

The statutes and rules pertaining to the California PUC and the ICC demonstrate beyond any doubt that each of those agencies, while encouraging a free flow of reliable information by persons with a competitive interest, have at the same time very comprehensive powers to eliminate delays, obstructions, harassments, or machinery-clogging.

The activities complained of in the complaint merely fall within the normal and regular scope of protests in certificate proceedings before the PUC, the ICC and the courts.

c. Protest Activities Before the PUC and ICC and Courts in Certificate Proceedings Are "Political Activity" Within the Meaning of Noerr

A case of great significance in establishing that the alleged acts of defendants fall within the definition of "political activity" in *Noerr* is *NAACP v. Button,* 371 U.S. 415 (1963). In the *Button* case, the Court was concerned with a Virginia statute which made unlawful (a) advising a person that his legal rights had been infringed and referring him to a particular group of attorneys for assistance and (b) knowingly rendering legal assistance

to the person thus referred. The court struck down that statute as a violation of the First Amendment, declaring that (371 US at 429-430):

> "*In the context of NAACP objectives, litigation* is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. *It is thus a form of political expression.* Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930's, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practical avenue open to a minority to petition for redress of grievances." (Emphasis added.)

The Court went on to cite the *Noerr* decision.

If litigation may be ". . . a form of political expression", then clearly it is wrong to assert that all activity of a litigation character is excluded from the *Noerr* doctrine. That is what plaintiffs seek to do when they carve out of the *Noerr* doctrine all activity which might be described as "judicial" in nature, whether before an administrative tribunal or a court.

The Court in *Button* does imply that litigation to resolve private differences may not fall within the concept of "political activity," and that such litigation may not be protected by *Noerr*:

> "In the context of NAACP objectives, *litigation is not a technique of resolving private differences . . .*".

Here, then, is the outer limit of the *Noerr-Pennington* doctrine. Litigation to resolve private differences is qualitatively different from litigation which is political, i.e., which is designed to influence a change in policy. Litigation to resolve private differences is merely an instrumentality for the enforcement of private property or contractual rights; litigation to influence policy is of the essence of representative government. And this must be true, whether the forum is executive, legislative, judicial, or administrative.

The alleged activities of defendants were efforts to influence a policy making or law making function of government, and thus within the meaning of "political activity". *Noerr,* 365 US at 137. This will become clear from the following considerations.

Under California law no highway common carrier can lawfully operate without obtaining a certificate from the California PUC "declaring that public convenience and necessity requires such operation". P.U. Code § 1063. Similarly, a motor common carrier transporting in interstate commerce may not lawfully operate without first obtaining from the ICC a certificate of public convenience and necessity. Interstate Commerce Act, § 207(a), 49 U.S.C. 307(a).*

*An exception applies to carriers possessing state certificates and operating wholly within a single state if such carriers registered their state rights with the ICC prior to October 15, 1962 and took advantage of the grandfathering provisions in the amendatory provisions which took effect on that date. An exception also applies under which, pursuant to such amendatory language, a state commission may grant interstate rights, which must be based, however, upon proof of public convenience and necessity, where a single state operator is simultaneously seeking from the state commission an intrastate right of like scope. Interstate Commerce Act, § 206 (a)(1)-206(a)(7), 49 U.S.C. 306(a)(1)-306(a)(7).

The phrase, "public convenience and necessity", is not defined under either California or federal law. It is only a general guide. The California Legislature and the Congress have delegated to the PUC and ICC, respectively, the legislative function of giving it content and meaning.

In California the PUC has given "public convenience and necessity" different content at different times. Amongst the factors which it considers are (1) fitness and willingness of the applicant to perform the service, (2) adequacy of existing service, (3) the effect of additional certification upon carriers already in the field, (4) desirability of "regulated competition" as opposed to monopoly. Its determinations on public convenience and necessity unless wholly arbitrary, are final. The California Supreme Court has so indicated in the following cases: *Oro Elec. Corp. v. Railroad Comm.*, 169 Cal. 466, 471 (Cal. 1915); *L. A. Metropolitan Transit Authority v. Public Utilities Commission,* 52 Cal.2d 655, 659 (1959); *California Motor Transport Co. v. Public Utilities Commission,* 59 Cal.2d 270 (1963).

Thus, the California Public Utilities Commission is vested not only with the power to determine whether "public convenience and necessity" require the augmentation of competition in a particular transportation market, but even with the power to determine, within broad limits, the meaning of that statutory language. Beyond any doubt, the Commission in every operating rights case not only establishes an economic policy for a particular market, but does so according to a flexible standard which the legislature has never defined and which the courts have declined to construe. The California Supreme Court

has gone no further than to say, in the *California Motor Transport Company* case, *supra* (a case which was part of the alleged "conspiracy" herein), that the commission must state what factors it finds material to the public convenience and necessity standard, and make basic findings thereon.

Turning to "public convenience and necessity" under the Interstate Commerce Act, Congress in the Transportation Act of 1940 did give to the ICC some limited guidance when it enacted the "National Transportation Policy", 49 USC preceding Section 1:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of [the Interstate Commerce Act] shall be administered and enforced with a view to carrying out the above declaration of policy."

Subject to this very limited guidance, the ICC must give content to "public convenience and necessity" according to its own views, so there is an enormous area of discretionary policy making.

The federal courts, like the California Supreme Court, have not interfered with the ICC's determination of public convenience and necessity so long as the decision is based upon rational findings and conclusions. As the Supreme Court said in *Burlington Truck Lines Inc. v. United States,* 371 U.S. 156 (1962) "expert discretion is the lifeblood of the administrative process" and decisions of the ICC granting or denying certificates of public convenience and necessity will not be disturbed provided there is a rational basis, adequately set forth, for the decision.

The standards imposed upon the PUC and ICC in granting or denying applications to purchase or sell operating authorities, are if anything, even vaguer than "public convenience and necessity".

Section 851 of the California Public Utilities Code, which governs the purchase and sale of operating rights, contains no standard whatsoever. In other words, the constitutional and legislative mandate is simply that transfers of operating rights be permitted only if they are consistent with the public interest, as that interest is seen by the Commission.

Under Section 5(2) of the Interstate Commerce Act, the ICC is directed to approve the transfer of a certificate if it ". . . will be consistent with the public interest . . ." (Section 5(2)(b), 49 USC Section 5(2)(b).) Where the

carrier is in the category covered by Section 212 of the Interstate Commerce Act, no standards whatsoever have been imposed by Congress. Section 212(b) provides simply that "except as provided in Section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe." See also, the general standards for temporary operating authorities, and for the operation under lease of another carrier's operating authorities, contained in Interstate Commerce Act, Section 212(a), 49 USC 310(a).

It is obvious from the foregoing that under the powers delegated to the PUC and ICC, those bodies do in fact exercise a great deal of authority in the area of governmental policy and lawmaking. While their decisions may most immediately affect individual carriers, their decisions must necessarily be based upon the formulation of governmental policy which reaches a large segment of the economy. The question before an agency in a certificate case is, how will the public be affected if the number of competitors in the market is increased. Will the service improve or deteriorate? Will costs, and therefore rates charged to the public, go up or down? In short, what economic policy, what degree of competition, will most benefit the shippers and receivers of freight? That question is "legislative" not in the sense that the Legislature, as constituted, can efficiently answer it, but in the fundamental sense that it is a policy making and lawmaking function, where the dialogue between the people and the administrators is as worthy of protection as any dialogue between the people and their legislators or executives. This process in no way resembles a ". . . technique

of resolving private differences". *NAACP v. Button, supra,* 371 U.S. at 429.

The fact that the PUC and ICC obtain information through quasi-judicial procedures obviously does not affect the foregoing conclusions. When an agency gathers the facts through such procedures, it is simply employing one of several effective methods of educating itself. Indeed, legislatures themselves, particularly in recent years, have used many of the same procedures in the preparation of committee and subcommittee reports. The method of fact-gathering varies according to the type of information which is needed, and this is true whether the fact-gathering body is a legislature, an executive, or an administrative agency.

Plaintiffs devote a great deal of discussion to Judge Friendly's article referred to earlier (*The Federal Administrative Agencies,* etc., 75 Harv.L.Rev. 863 (1962)). The burden of his article is that agencies should develop and publicize standards for the resolution of the complex decisions which they make. These decisions are non-legislative in the sense that the Legislature could not resolve them through its ordinary processes or within its regular organizational framework. But nothing in the Judge's article suggests that the administrative agencies, whether in certification cases or in any other kind of proceeding, do not make policy or do not in fact make laws.

It must be concluded that the alleged activities of defendants before the PUC and ICC, and before the courts in conjunction therewith, constitute "political activity" within the meaning of *Noerr* and are beyond the reach of the antitrust laws.

3. The Patent Cases Relied on by Plaintiffs Are Not Pertinent

It was intimated in *NAACP v. Button, supra,* that litigation for the purpose of resolving private differences might fall outside the concept of "political activity" and therefore not be immune to the antitrust laws. The patent cases relied upon by plaintiffs fit this description. A patent is a private property right consisting of a right by the holder to exclude all others from making, using, or selling a device which incorporates the idea covered by the patent. 35 U.S.C. §§ 154, 261. The right to exclude is absolute, and though created by the Legislature, is a private right which may be bought, sold, licensed, leased, assigned, or shared with others through the execution of private contract. No governmental authorization (other than recording) is required to legitimate any such transaction in patent rights. No governmental agency or official has any power to dilute the economic value of a patent by issuing another patent for the same idea to anyone other than the original patent holder. No governmental agency or official has any power to cancel a patent. The policy-making function of government was exhausted when Congress enacted the Patent Laws. The Patent Office has no discretion to refuse the issuance of a patent, if the idea or device is unique. If a competitor files an interference in a patent case, claiming that his previously issued or pending patent covers the same idea or device, the Patent Office must make a decision. However, the Patent Office has no discretion in making that decision, nor may the Patent Office consider any factors other than the claims which are made for the respective patents, and the nature of the ideas or devices involved. Only Con-

gress by amending the Patent Laws, can exercise any discretion in determining the degree to which the competition will be restricted for the purpose of encouraging the inventive arts.

Thus when a patent holder goes to court and files an infringement action, he calls upon that same function of government which a landowner invokes when he seeks to enjoin a trespass on his property. The Court is not concerned as to the wisdom of granting to the patent holder the absolute right to exclude others from his private property. That is a decision which has been made by Congress. The only question is, has there been any infringement? The public interest, as that interest might be construed by the Court, has nothing to do with the outcome of the case. The litigation on patent rights is, therefore, totally apolitical.

It may be argued that this is not always the case. Indeed, the *Button* decision, and many other decisions, particularly in the area of civil rights, have shown that litigation of ostensibly private property rights may indeed be political. The right of private owners to exclude others from their property must bow to other rights, such as the right of any person to use of the facilities of a public innkeeper, and the right of persons under the Equal Protection clause of the Fourteenth Amendment to the equal use of publicly-owned facilities. When one policy must be weighed against another, in the light of the public interest, that litigation becomes "political". But no such question is presented in a patent infringement suit.

For the reasons stated, it is clear that patent enforcement falls into the category of "private litigation" and is therefore in a very different category from proceedings involving certification. A certificate of public convenience and necessity is not a property right at all. It is a license to operate within a given area, and the licensing agency is free to give as many identical rights as it believes justified under the governmental policy committed to its care. It is nothing more than a right to do business, subject to many conditions, and it carries with it no right to exclude any other competitor from the field. The essence of the certificate granting authority is that it shall be exercised only when required by the public interest. The proceedings are therefore part of the political process, thus making the *Noerr* doctrine applicable.

Because of the vital distinction noted there is no reason to analyze in detail the various patent-antitrust cases cited by plaintiffs. It is enough to note that the Court below held the patent cases irrelevant on the ground that in none of them did the Court hold or say that mere association for the bringing or threatening of a patent infringement suit—*without more*—is, itself, an antitrust violation, merely because the associates may contemplate injury to a competitor.

D. The "Sham" Exception in Noerr Does Not Apply

The Supreme Court in *Noerr* stated that there may be situations in which a campaign "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt

to interfere directly with the business relationship of a competitor and the application of the Sherman Act would be justified".

In that case a finding of fact was accepted that the conspirators' sole purpose was to destroy the truckers as competitors and to hurt them in every way possible, including to destroy their good will, even though they, the conspirators, might have no success in influencing legislation.

Such intent was found insufficient to constitute the activities of the defendants as "sham" as the Court used that term. The Court stated that, if the complaint was to be believed, the effort of defendants was not only genuine but highly successful.

The present complaint is not unlike the *Noerr* complaint in this respect. There is no allegation that defendants did not genuinely try to influence the PUC, the ICC, and the courts. As previously noted, the plaintiffs admit in their brief at page 8, that defendants, in appearing before the PUC, the ICC, and the courts, made "the best case the facts would permit". The court below noted that plaintiffs in their brief before that court submitted an exhibit showing that 21 out of 40 matters which had reached the decision stage resulted in action wholly or partly favorable to defendants.

Plaintiffs obviously tried to make allegations which would fit within the "sham" exception when they filed their First Amended Complaint. However, they could not truthfully make the kind of assertions which would have accomplished that result. They simply made the ambiguous allegation that the protests were filed "with or with-

cut probable cause, and regardless of the merits of the case". Along with that allegation, plaintiffs found themselves compelled to admit in their pleadings that defendants were successful in persuading the agencies to deny some of plaintiffs' applications or to grant some only in part. Plaintiffs also made the remarkable allegation that those decisions in which defendants were wholly or partly successful ". . . would not have been rendered adverse to plaintiffs and other competitors of defendants, because no opposition would otherwise have been commenced".

Plaintiffs also alleged that defendants were successful in persuading the PUC to alter its policies with respect to the granting of certificates, so that after 1961 certificates were not as freely given as before.

Thus, from the pleadings in the Complaint itself, it is established that defendants' protests before the agencies and in the courts were in fact made with probable cause and cannot be characterized as "sham". This was recognized by the lower court when it stated, in the Memorandum of Decision (R. 56-57):

> "However, the First Amended Complaint does not allege that all or any of the oppositions mentioned in the pleading were filed or were to be filed without probable cause. The pleading carefully refrains from charging that the oppositions were false, misleading to the agency or lacking in factual allegation and legal theory arguably relevant to the function of the regulatory agency in determining public convenience and necessity. The allegation is merely that defendants combined to file them 'with or without probable cause'. This allegation falls far short of charging that the oppositions would not be upon probable

> cause. On the contrary, it implied that all or at least some of the oppositions may have been filed *with* probable cause. [Emphasis in original.]
>
> "Nor does the First Amended Complaint allege that all or any of the applications made by plaintiffs (which defendants oppose) were meritorious under the applicable regulatory acts. The allegation carefully refrains from alleging that they were. Plaintiffs merely allege that defendants combined to oppose their applications 'regardless of the merits of' the applications. This falls short of alleging that the applications were meritorious. On the contrary, it implies that all or at least some might be without merit."

The public records of the PUC and ICC would demonstrate that with two exceptions (Garden City Transportation Co., Ltd. and Callison Truck Lines, Inc. operated solely in Northern California), each of the defendants was individually, or together with an affiliated defendant, certificated to provide transportation over California highways between all major commercially significant points. Thus, any application for new, transferred, or registered operating authority filed by any plaintiff would necessarily involve increased competition to virtually all of the defendants. Each defendant thus had competitive standing individually to protest any of the applications which are the subject of this complaint. And certainly in every case, with a large number of certificated carriers already operating in the market (there are seventeen named defendants, counting the two Ringsby companies as one, and counting Oregon-Nevada-California Fast Freight and Southern California Freight Lines as

one), it could not be said that there was no probable cause to believe that protestants might be able to persuade the agency that "public convenience and necessity" did not require the addition of another competitor. A glance at any one of the dozens of application proceedings which are the subject of this case will show that the agencies consider a profusion of economic and statistical evidence before deciding whether or not to grant authority to a new competitor.

To summarize, there is really no issue of "sham" or lack of probable cause in this case, for two reasons. First, as the District Court held, there has been no proper allegation of sham or lack of probable cause. Second, there could not be as a matter of fact any sham or lack of probable cause, where with but insignificant exceptions all of the defendants at all relevant times were, with each application filed, faced with additional highway common carrier competition, and it cannot be said that defendants did not hope and expect to achieve success in a significant number of cases.

E. Economic Harm to Plaintiffs Resulting from Defendants' Alleged Activities Does Not Make the Noerr Doctrine Inapplicable

The mere fact that the alleged activities of defendants might have caused incidental injury to the plaintiffs, independently of the results of action by the PUC, the ICC, or the courts, does not destroy the immunity of *Noerr*. Thus, in *Noerr* it was said (365 U.S. 143):

> ". . . the findings of the District Court that the railroads' campaign was intended to and did in fact injure the truckers in their relationships with the public and with their customers can mean no more than that the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action and that the railroads were hopeful that this might happen. . . . It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing such campaigns. We have already discussed the reasons which have led us to the conclusion that this has not been done by anything in the Sherman Act."

Since plaintiffs' only other allegation of injury is based upon alleged harm coming from adverse decisions of the PUC, the ICC and the courts, it has failed to allege *any* activities upon which damages could be recovered. Damages cannot be based upon orders of governmental bodies. *Parker v. Brown,* 317 U.S. 341 (1943).

CONCLUSION

For all of the reasons stated herein, it is respectfully submitted that the District Court's Order Dismissing Appellant's First Amended Complaint be sustained.

Dated, San Francisco, California,
December 13, 1968.

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